No. 4496.

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United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Alexander B. Stewart, Frank Kubota, Jack Miller and Oscar Lund,
Plaintiffs in Error,
vs.
United States of America,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR, UNITED STATES OF AMERICA.

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I.

The Indictment.

The plaintiff in error, Jack Miller, hereinafter called the defendant, was indicted June 13, 1924, together with several other defendants. The indictment contained four counts; the first count charging conspiracy to violate section 3 of title II of the National Prohibition Act and section 593 of the Tariff Act of 1922; the second, charging a violation of section 593 of the Tariff Act of 1922; the third a direct violation of cer-

tain other requirements of section 593 of the Tariff Act of 1922; the fourth, a conspiracy to violate section 3, title II, of the National Prohibition Act.

II.

Statement of Facts.

Briefly stated, the record shows that one George Cheney was the owner of a small ranch in Topanga Canyon, Los Angeles County, California. That early in 1923, certain of those persons charged jointly with defendant Miller approached Cheney, and made arrangements to and did construct a warehouse on the ranch which was used for the storage of liquor. That defendant Miller, and two co-defendants came to the ranch and went into the warehouse at a time when there was liquor in it. That the liquor stored at the ranch was stolen by certain "hi jackers", and that after this theft occurred Miller, accompanied by the same co-defendants, again came to the ranch, was told what had occurred, looked into the warehouse and went away. [Tr. of Rec. 135, 136.]

That on March 22, 1923, there was unloaded upon the wharf of the Curtis Corporation at Long Beach, California, a large quantity of intoxicating liquors, which had been there transported aboard the Japanese fishing vessel "Nagai". That this liquor was reloaded into two trucks and a touring car, and that certain police officers discovered the occurrence, raided the Curtis plant, and after several shots had been fired, placed under arrest the persons there found.

That Police Officer Costegan saw defendant Miller in front of the Curtis plant walking toward it. That Miller stopped the officer and asked him where the shooting was, whereupon the officer placed Miller under arrest. [Tr. Rec. 147.]

The record shows that on the following day Police Officer O. M. Murray interviewed defendant Miller in the Long Beach jail and that Miller then told him he was a bookkeeper from Astoria, Oregon, and that he had come to Long Beach the day before the arrest [Tr. of Rec. 146], which statement was untrue.

That later Miller made a truthful statement to Prohibition Agent Dolley saying that he, Miller, was treasurer of the Independent Exporters Limited, a wholesale liquor house of Vancouver. [Tr. of Rec. 163.] That certain of the co-defendants had some time previously come to him in Vancouver and purchased a cargo of liquor to be brought to Los Angeles on the boat Borealis; that they had made a down payment of ten thousand dollars on the cargo, and that he, Miller, had come to Los Angeles for the purpose of collecting additional moneys and of giving to the said defendants orders on the captain of the Borealis to release liquors to the amount of the moneys so paid; that Miller showed Dolley a note book (U. S. Exhibit No. 17) evidencing such payments, and said that he, Miller, had arranged with the defendant Kubota to transport the liquor from the Borealis. He also there identified U. S. Exhibit No. 19 as representing an invoice of the cargo of the Borealis as it left Vancouver [Tr. of Rec.

163, 164, 165]; said that he was in the office of the Curtis plant while the liquor was being unloaded, and upon hearing certain shots went out upon the street, where he was arrested.

III.

Specifications of Error.

Defendant relies upon ten specifications of alleged error, each of which we will consider in the order it is raised by him.

Argument.

I.

Counsel for defendant Miller assert that "the testimony of a co-conspirator should be regarded with suspicion, and contend that the defendant was prejudiced to the extent that the testimony of co-defendants Cheney and Nagai, alleged by them to be uncorroborated, was relied upon.

No exception was taken to the instructions of the court, nor was any other or additional instruction upon this point requested, and it is therefore to be presumed that the court correctly instructed the jury upon the law relating to the testimony of co-conspirators,

> Fuller v. Schuh-Mason Lumber Co., 6 Fed. (2nd) 531,

the appellate court not being required to pass on questions which have not been properly preserved in the trial court.

> Short v. U. S., 221 Fed. 248;
> Robilio v. U. S., 291 Fed. 975;
> Feinberg v. U. S., 2 Fed. (2nd) 955.

While Federal courts have held that the testimony of an accomplice, although entirely without corroboration, will support a conviction of one accused of crime, (U. S. v. Lancaster, 44 Fed. 896) the trial court gave the following instruction requested by defendant:

"You are instructed that in a case such as this, the testimony of a conspirator, in behalf of the prosecution, should be viewed with suspicion and should be fully corroborated to warrant conviction." [Tr. Rec. 72.]

Moreover, in point of fact the testimony of both witnesses was substantially corroborated. The testimony of Cheney to the effect that he had seen Miller on his premises was corroborated by the testimony of Mrs. Valeria Cheney, who testified

"I did not see Miller and Talbot until after the high jacking, I never saw any of the defendants other than those first named." [Tr. Rec. 137.]

Defendants assert that Cheney said he only *thought* the building alleged to have been erected by the conspirators, contained liquor; the record does not stop with the employment of the word complained of but shows Cheney's testimony to be

"Miller, Talbot and Lund went into the warehouse and at that time there was liquor in it * * * Miller came out right after the hi-jacking * * * I said it was this hi-jacking party that had taken the stuff away and they went and looked into the building and turned around and went away."

Any possible doubt as to the character of the 'stuff" referred to is set at rest by the testimony of Charles G. Baird, a transfer man, who helped the "hi-jackers" take it away from the Topanga Canyon warehouse, believing them to be prohibition agents:

"I think we got about 135 or 140 cases of liquor and brought them to 820 West 3rd St. I drank some of the liquor and know that it was whiskey." [Tr. Rec. 140.]

As to the testimony of Nagai, defendant complains that Nagai only *thought* the defendant Miller was on his boat. While he used the word *thought*, he later testified:

"When I loaded up the liquor from the big boat, the crew of the big boat, and not Mr. Miller, told me to load. Mr. Miller was in my boat at that time, but they told me from above to load up, so I went down, cleaned up the stuff and loaded up. Mr. Miller rode upon my boat with me, and rode back with me after I had loaded the liquor * * * I was paid about $150 or $160 for carrying this liquor on my boat. I am not quite sure who gave it to me. Well, as near as I can remember it was Kubota or Mr. Miller, I am not sure." [Tr. Rec. 140.]

Moreover, Miller himself, according to the record, admitted a connection with the traffic referred to, stating to Prohibition Agent Dolley that he had an agreement with Kubota to pay him $4.00 a case for the transportation of this liquor, and that Kubota had hired another Jap to whom he paid $1.00 a case for doing the actual work. [Tr. Rec. 165.]

Of course the record shows that the testimony of Nagai and Cheney was corroborated by the apprehension of Miller in front of the very place where the liquor was being unloaded, by the note book and invoices received in evidence, by the telegrams sent by him and by the inherent improbability of the story told by him in his own defense.

II.

Defendants assert that "opinion evidence is inadmissible" and complain that Nagai testified:

"We loaded boxes and I *presume* it was liquor" omitting to call to the court's attention the fact that the trial court then asked:

"Q. Why did you presume it was liquor?
A. I didn't know, I couldn't see the writing on it, so I didn't know what it was, but *afterwards I found out it was liquor.*"

As of course did the officers of the law, when they seized it loaded upon automobiles at the Curtis plant.

III.

It is the third position of defendants that "a witness may refer to notes to refresh his memory, but that he is not allowed to read them as his testimony."

With this position we have no quarrel, asserting simply that the record shows Mr. Imbrose did not "read his notes as his testimony" as they attempt by a somewhat tortuous process of reasoning, to show. The record is plain and discloses that Mr. Imbros' testimony was:

"Q. Will an examination of these notes which you have now so refresh your recollection as to give you a present recollection of that which then occurred?

A. Yes, sir." [Tr. 149.]

"Q. Now, by referring to these notes, can you so refresh your present recollection as to now remember what happened then?

A. Yes, *by looking over* these notes." [Tr. 150.]

"The Court: I understand, Mr. Imbros, that you have no present, independent memory of this conversation?

A. Well, it has been so long since this happened, and I have had so many cases in the meantime, that I can't think of them all without having notations of them.

The Court: And it is therefore necessary for you to *refer* to these notations?

A. Yes, sir." [Tr. 153.]

"The Court: All right, you may refresh your recollection if it does refresh your recollection. If you have any independent recollection outside of the notes, of course you can't use them. If you have not you may use your notes to refresh your recollection." [Tr. Rec. 156.]

Moreover, an examination of the testimony given by Mr. Imbros will make plain that the defendant Miller was not mentioned in it, and that it had no bearing upon him direct or indirect and could not under any possible theory operate to his prejudice.

IV.

It is the fourth assertion of counsel that "evidence of other crimes is not competent to prove the specific crime charged."

While we concede that this is as a general proposition, the law, the question to which the answer complained of was *not* as defendant states in his brief asked by the prosecution but was on the contrary asked by Mr. Wright one of defense counsel and alluded upon cross-examination of Harold Dolley, one of the government's witnesses.

"Q. Well, now, he had never been in jail, had he, up to this time?

A. I understand he served five years in Vancouver."

The answer given was responsive to a question asked by defense counsel, and we submit that counsel having embarked on a fishing expedition should not complain of the catch. A defendant cannot complain of error in the admission of evidence which he himself draws out.

State v. Hamey, 57 L. R. A. 846;
Johnson v. Walker, 1 L. R. A. (N. S.) 470.

V.

It is the fifth position of counsel for defendant that "evidence of other crimes is unduly prejudicial to defendant" and they assert that "the erroneous admission of evidence against an accused will be presumed

to be prejudicial unless it is made to appear beyond a doubt harmless and cite:

Sprinkle v. U. S., 150 Fed. 56;
Ayle v. U. S., 205 Fed. 542;
Miller v. Territory of Okla., 149 Fed. 330;
Williams v. U. S., 158 Fed. 30."

All of these cases were decided prior to the amendment of section 269 of the Judicial Code which provides in part:

> "On the hearing of any appeal * * * civil or criminal * * * the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." (J. C. 269.)

In view of this amendment the burden is on the plaintiff in error to show that error in the admission of testimony was prejudicial.

Simpson v. U. S., 289 Fed. 188.

An examination of the record discloses they have not met this burden. The invited answer alleged to be error is beyond doubt harmless. No attempt was made by the government to show any previous crime on the part of Miller; nothing appears in the record save the answer by Dolley upon cross-examination above referred to that he "understood he (Miller) had served five years in Vancouver." Obviously, the mere expression on the part of *one* witness called by the government as to his *understanding* of the fact that Miller

had been in jail in Vancouver, B. C., without stating his "understanding" of the reason for his being there, when such "understanding" was alluded upon cross examination and not followed up by the government, could not cause the jury to be of the opinion that by reason of that "understanding" Miller was guilty of the offenses against the laws of the United States charged.

The statement of Dolley, if error, is we contend not available to defendant, for:

> "When it is plain that there is no injury, the exception is not available."
>
> Sawyer v. U. S., 202 U. S. 150;
> Willmering v. U. S., 4 F (2nd) 209.

The record in its entirety moreover shows the evidence of the guilt of the defendant to be so strong and convincing that one cannot see how even the direct imputation of one or more additional crimes could have affected the verdict. In such a case this court has held error does not justify reversal.

> Whitaker v. U. S., 5 F (2nd) 546.

VI.

It is the sixth position of defendant that an admission of guilt made by the defendant outside of court is inadmissible, if it was made under circumstances involving such a hope of benefit as was likely to induce a false confession.

No objection was made upon trial to the testimony of Dolley, nor was any motion made to strike it out.

The defendant cannot therefore now complain of its admission.

Short v. U. S., 221 F 248;
Robirlio v. U. S., 291 F 975;
Feinberg v. U. S., 2 F (2nd) 955.

The record moreover shows that the statements made by Miller to Dolley were not made "under circumstances involving such a hope of benefit as was likely to induce a false confession"; Dolley testified:

"By Mr. Wright: At that time was there any arrangement made as to what Mr. Miller would receive; or what benefit he would receive, if he went to Vancouver with you?

A. No, sir; I told Mr. Miller from the very time I first talked to him * * * that I was not in a position to offer him anything; that he would have to take his chances." [Tr. Rec. 170.]

Miller had himself been an officer, testifying:

"I was a member of the Northwest Mounted Police for a period of four years and seven months, during which time I had occasion to arrest approximately 40 or 50 violators of the law, some of whom undoubtedly made statements, admissions and confessions to me."

He knew Dolley was an officer when he made the statements concerning which Dolley testified:

"When I talked to Dolley I thought he was a federal officer."

The testimony of Miller himself shows that no such hope of benefit existed as his counsel now assert.

"Dolley did not threaten me in any way, no violence was used toward me and no offer of reward held out to me." [Tr. 195.]

VII.

Defendants next assert that the court permitted improper redirect examination.

That the court did not abuse its discretion in allowing the examination complained of is we submit, apparent from the examination of the record, the court having merely permitted Nunn to be asked upon redirect examination to recount a conversation had by him with Knowlton at a time, place and under circumstances concerning which Nunn had testified upon direct examination. It is difficult to see how prejudice could have resulted to any defendant from the court's ruling; certainly as the conversation admitted had no connection, direct or indirect, with the defendant Miller, its admission ever if error could not prejudice him.

VIII.

Defendant's eighth objection is that a certified transcript of the proceedings in a case brought by the state of California v. Knowlton alias King was offered and received in evidence.

It was offered and received as tending to show that Knowlton, alias King, was arrested transporting liquor along a highway leading from Topanga Canyon—the place where the indictment charged the defendants had conspired to and had stored liquor, as a circumstance

tending to connect Knowlton with the liquor there stored. It was a circumstance, therefore, relevant.

The certified transcript referred to had no reference direct or indirect to defendant Miller; did not in any wise tend to connect him with any of the offenses charged in the indictment. Its introduction therefore, even if error, could not have been perjudicial as to him.

IX.

Defendant's ninth exception relates to a question asked by counsel for the government as to the sending of a telegram December 26, 1922, the indictment alleging the conspiracy to have been formed in January, 1923.

Conceding that "the Overt Act required * * * must be a subsequent, independent act, following a complete conspiracy, and done to carry into effect the object of the conspiracy" the government did not charge, nor attempt to prove, the sending of such a telegram as an Overt Act.

The only reference to such a telegram is found in a question addressed to the defendant Talbot in an attempt upon cross-examination to prove the falsity of the following statement made by him:

"I never did have any business dealings with Mr. Jack Miller." [Tr. Rec. 211.]

The record shows that Jack Miller testified that he had sent a certain telegram to A. L. McClary, *802 Vancouver Block, Vancouver,* reading:

"Will be home next week. Everything ok. Will have all moneys with me. Stop. If any Perfect arrives keep that for me. Must have about five hundred."

Signed J. Miller"

In an attempt to show by cross-examination that Talbot had business dealings with Miller at the place the government contended was Miller's office, *802 Vancouver Block, Vancouver,* Talbot was asked the question complained of:

"Q. Did you, then, from Vancouver, send a telegram to Mrs. Hazel Talbot, 6575 Fountain Avenue, Los Angeles, California, reading "Arrived at Vancouver this morning. Am all right. Will wire you when I leave. *Address 802 Vancouver Block* Love, Larry." [Tr. 211.]

to which Talbot replied that he did not remember, and did not know whether the office of the defendant Jack Miller is located at 802 Vancouver Block. [Tr. 213.]

The matter was pursued no further and no attempt made by the government to show that such a telegram was in fact sent.

Obviously, the question asked was by way of proper cross-examination to show the falsity of a statement testified to in chief.

X.

It is the tenth position of defendant that the "admission of testimony concerning contents of purported telegram violated the best evidence rule."

The complete answer to this contention is to be found in the fact that no evidence "concerning the contents of purported telegram" was offered or received. The witness was asked if a telegram of a certain tenor was sent. He testified that he did not remember and the matter ended there.

Conclusion.

It is respectfully submitted that the alleged errors complained of having been shown to be unsubstantial, this case falls squarely within the rule that "only a very plain and substantial error of law in rulings on evidence and instructions will warrant upsetting a verdict based on persuasive circumstantial evidence where the jury obviously declined to believe defendant's testimony.

295 Fed. 447.

We assert the circumstances surrounding defendant's arrest, his own statements thereafter admitting facts which if true, established his guilt, the inherent improbability of the testimony given by him upon the witness stand so operate as to require that the conviction and judgment be affirmed.

Respectfully,

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